SUMMARY OF ARGUMENT

The appellees Samuel C. Cratch and William R. Marion stand in the same position on the questions raised in this appeal. The filing of a joint brief would have been preferable, but the respective circumstances of the appellees did not permit such.

The brief for appellee William R. Marion is an excellent presentation of the same points that the appellee Cratch feels dispositive of his case and he hereby adopts the general and specific arguments as presented and the cases cited in support thereof. To do otherwise would be more a matter of repetition without necessarily contributing anything further to the appellee Cratch's position.

Treading the path of reason and law prepared by the appellee Marion, one finds both cogent and compelling the manner and form of presentation.

The appellee Cratch does feel that some additional comment and argument would be appropriate in certain instances and, accordingly, his method of presentation will be to highlight and, hopefully, develop certain aspects.

ARGUMENT

I. THE RULING OF THE DISTRICT JUDGE MAY NOT BE APPEALED DIRECTLY TO THIS COURT

The Order Granting Appellee's Motion to Dismiss the Indictment Did Not Sustain a "Motion in Bar" Under Former Title 18, U.S.C., § 3731.

The appellees' position regarding the jurisdiction of the Court was well presented in their Motion to Dismiss or Affirm.

The appellee Marion's position in his brief on the merits is well taken and further supported by the fact that the Government in its attempted reliance upon *U.S. v. Weller*, 401 U.S. 254 (1971), contended that that case was

> . . . where the defendant did not deny that he had committed the acts charged or that those acts constituted a crime but nevertheless urged that he could not be prosecuted because of some extraneous factor. . . . [Br. 13-14]

This contention crumbles upon a reading of the *Weller* opinion (¶ 3), in which Justice Stewart states:

> He has not confessed to a crime and claimed an immunity from prosecution; *he argues that he has committed no crime.* [Emphasis supplied.]

Accordingly, as the appellee Marion correctly pointed out, the import of the *Weller* decision is not to support the jurisdiction of this Court, but rather to disclaim it.

II. THE DISTRICT JUDGE PROPERLY EXERCISED HIS DISCRETION IN DISMISSING THE INDICTMENT FOR UNNECESSARY DELAY IN PRESENTING THE CHARGE TO A GRAND JURY

The Accusations of Crime and the Identity of the Accused Were Common Knowledge in the Community, and the Defendant's Records in the Possession of the Government, Several Years Before the Indictment was filed.

> *Accusator Post Rationabile Tempus Non Est Audiendus, Nisi Se Bene De Omissione Excusaverit.* (Moore, 817)

The Government has failed to offer any explanation for the extraordinary delay, other than low priority on an understaffed office list. There is no dispute that the delay was a lengthy one. It is urged upon this Court that even if there was this procrastination, there was no obligation to prosecute at any given time. As one justification as to why the Government should not be required to prosecute at any particular point, it is suggested that where there is concurrent federal–state jurisdiction, the state should have the primary responsibility for instituting criminal proceedings and the federal prosecutor should wait and see what position the state assumes. No such rationale can be applied

to the instant case! If repetition can add significance, then the District Judge's ruling on the appellees' Motion to Dismiss or Affirm should be reread.

> The Court, therefore, views that there has been a lack of speedy prosecution *in this case*, and will grant the Motion to dismiss. (App. 39) (Emphasis supplied.)

The Government cavalierly dismisses the impact of the delay upon the powers of recall by reference to both extent and terminated civil actions against the appellees that involve the same fraudulent scheme for which the Government indicted them. (Br. 7, n. 2) Under scrutiny these cases make untenable the Government's position as asserted against appellee Cratch.[1]

It is also deemed significant that the appellee Cratch did not have possession of the documents or records *before* they were turned over to the Government. (App. 13, 31-34)

The Government can find no solace with respect to appellee Cratch by reference to the Federal Trade Commission

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[1] *Crutchfield v. Allied Enterprises, et al.*, C.A. 1916-66, wherein appellee Cratch was not named, served or mentioned.

Harris v. Allied Enterprises, et al., C.A. 1917-66, wherein appellee Cratch was not named, served or mentioned.

Talbert v. Cratch, et al, C.A. 1950-66, wherein appellee Cratch was never personally served and an appearance was entered by the firm currently representing appellee Marion. Case settled and dismissed with prejudice without Cratch ever having been involved, as of December 30, 1968.

Elliott v. Atlas Credit Corp., et al., C.A. 2629-66, wherein appellee Cratch was named, not personally served, and case dismissed as to Cratch on August 29, 1968 by request of plaintiff.

Hawkins v. Allied Enterprises, et al., C.A. 253-67, wherein appellee Cratch was not named, served or mentioned.

Johnson v. Allied Enterprises, et al., C.A. 2458-67, again appellee Cratch was not named, served or mentioned.

Benson, et al., v. Allied Enterprises, Cratch, Marion, et al., C.A. 2451-68, wherein improper service upon Cratch was quashed as of October 27, 1970, a date well after the indictment in question.

proceedings or hearings, since appellee Cratch was not named in those proceedings either.

It is suggested that the Government grabbed the wrong end of the sword it attempted to forge out of advertence to the civil suits. Being cognizant of such litigation—which admittedly involved many of the same complainants listed in the indictment—the prosecution could and should have moved more rapidly than it did. When it did not, the District Judge dismissed the eventual indictment, which was both in his power and discretion so to do. Such ruling should not be disturbed.

III. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL SHOULD ATTACH AND OBTAIN THROUGHOUT THE CONTINUUM OF CRIMINAL LAW ENFORCEMENT FROM OFFENSE TO COMPLETION OF PUNISHMENT

An Accused Should Be Tried, Subject to the Requirements of Ordered Expedition, Within a Reasonable Time After the Government Discovers, or Should Have Discovered in the Exercise of Due Diligence, That a Crime Has Been Committed by Him.

Justice Brennan in a prescient concurring opinion in *Dickey v. Florida*, 398 U.S. 30 (1970), posed the question to which this Court may now respond:

> Can it be that one becomes an "accused" only after he is indicted, or that the Sixth Amendment subdivides "prosecution" into various stages, granting the right to speedy trial in some and withholding it in others? [at p. 43]

The Government contends that the protection of the Sixth Amendment cannot apply prior to an indictment. They mount much of their argument around the query as to at what point in time an individual becomes an "accused." In the discussion in *Dickey v. Florida, supra*, this point was addressed against the background of *Escobedo v. Illinois*, 378 U.S. 478 (1964), when the court spoke of the time when

> . . . investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.

While the Government does not accept the logical extension of such ruling, so as to bring the instant case within the ambit of or under the aegis of the Sixth Amendment, it does concede certain policies to be considered when viewing the question of a right to a speedy trial.

> In *United States v. Ewell, supra,* 383 U.S. at 120, this Court recognized that the Sixth Amendment's guarantee of a speedy trial is an "important safeguard [1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." (Br. 18)

The appellee Cratch concurs with the Government that the first of these policies is not germane to the issues in this case.

The second policy is not thought by the Government to be appropriate in a discussion of this case, despite the series of The Washington Post articles. It pursues tortuous reasoning to argue that the implications of the series of newspaper articles were not such that would constitute public accusation. By grammatical gymnastics the Government urges that such implications that there may have been were not attributed to the United States Attorney and, thus, no step need be taken to "minimize anxiety and concern." (Br. 19)

Resort to no higher court than common sense and semantics would demonstrate the frailty of that situation. The articles are replete with references to the United States Attorney's office, the United States Attorney, and kudos for the assault the United States Attorney's office was making upon such practices and people identified in the articles.

The articles certainly had an impact upon the life of appellee Cratch and both he and his friends certainly viewed

it as a public accusation. It is interesting to note that most "proper" indictments gain less notoriety than did the United States Attorney's "no indictment" approach.

The discussion concerning the third policy of impairing the ability of an accused to defend himself has been comprehensively explored and eloquently presented by the appellee Marion.

Thus the policies conceded by the Government to invoke the Sixth Amendment cry out for consideration in the instant case.

It is contended that prejudice attaches by the delay itself, even though it is further contended that prejudice need not be shown in the instant case.

> Indeed the delays in trials are often one of the greatest threats to individual rights. Both the accused and the public are entitled to a prompt trial. (*State of Federal Judiciary*, Remarks of Chief Justice Warren E. Burger, ABA convention, St. Louis, August 10, 1970.)

The appellee Cratch shares Justice Brennan's view when he stated in *Dickey v. Florida, supra*, at 55:

> Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest and indictment; . . . Insofar as these arguments are meritorious, they suggest that the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded.

The time and the case for such "hospitable interpretation" is now.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as without the jurisdiction of the Court. Alternatively, as a matter of the proper scope of review of a discretionary ruling of a trial court or upon a proper interpretation of

the Sixth Amendment as applied to the circumstances of this case, the order of the District Court from which this appeal is taken should be affirmed.

Respectfully submitted,

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Samuel C. Cratch

August 1971.